Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing	)))	CG Docket No. 04-208

To: The Commission

REPLY COMMENTS

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SUMMARY

Preemption. The Commission has proposed reversing its "prior pronouncement that states may enact and enforce more specific truth-in-billing rules" and asked for comment on whether it "should preempt . . . state regulation of CMRS carriers' billing practices" beyond its ruling that state "line item" regulations are unlawful rate regulation preempted by Section 332(c)(3) of the Act. Numerous commenters strongly supported preemption of state CMRS billing regulation, demonstrating that uniform, nationwide billing regulations serve the public interest by promoting competition and helping carriers reduce costs while at the same time protecting consumers' important interests in obtaining clear and accurate billing information.

By contrast, the National Association of Attorneys General, National Association of State Utility Consumer Advocates, National Association of Regulatory Utility Commissioners, certain state utility commissions and a coalition of consumer groups all oppose the Commission's tentative conclusion. These commenters maintain that preemption would erode needed consumer protections. This is simply not the case.

The Commission has the ability to safeguard consumers' interests. As Cingular showed in its comments, the Commission has powerful tools to regulate CMRS billing and protect consumers from abuses — Sections 201, 202, and 332 of the Act. Moreover, the Commission has proved its willingness to exercise such authority, establishing broad, binding principles and rules to promote truth-in-billing that are to be enforced pursuant to the bedrock consumer protection authority codified in Sections 201 and 202 of the Act.

No commenter opposing preemption has provided a factual basis as to why states need to regulate the bills for CMRS or why such regulation will not frustrate the federal objective of applying a uniform standard. Nor have such commenters presented facts explaining why consumers are uniquely in need of protections beyond those proposed by the Commission or showing that residents of particular states will be ill-served by the proposed rules. Simply put, the federal objective – clear and non-misleading bills – is the same as the states' and should not be applied in 50 different ways.

Further, the commenters opposing preemption virtually ignore the practical and significant public interest benefits inherent in a uniform, nationwide CMRS billing regulatory regime. Instead, these commenters raise a series of spurious arguments alleging that the Commission lacks legal authority to preempt state billing regulation. First, these commenters claim that the Commission is powerless to override state law, even where it stands as an obstacle to a valid federal objective, absent some clear expression of Congressional intent to preempt.

This argument is without merit. All parties agree that, under *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 344 (1986), "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and thereby "render unenforceable state or local laws that are otherwise not inconsistent with federal law." Moreover, the Supreme Court has made clear that, in this context, "a 'narrow focus on Congress' intent to supersede state law [is] misdirected," for a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *City of New York*, 486 U.S. 57, 64 (1988). There is no "'presumption against pre-emption,'" in such cases. *New York v. FERC*, 535 U.S. 1, 18 (2002). In sum, the inquiry into whether the Commission may preempt state CMRS billing does *not* involve a presumption against preemption or a question of Congressional intent, but rather turns on the question of whether the federal agency has properly exercised its own delegated authority.

There can be no doubt here that preemption of state regulation of CMRS billing is an appropriate exercise of the Commission's statutory authority. The Commission's billing regulations are firmly grounded in its broad authority over wireless telecommunications under Sections 2(a), 201, 202, and 332 of the Act. Wireless services have evolved to a national, interstate service, with nationwide platforms and national rate plans that do not recognize any distinction between local and long-distance service, and carriers employ networks and billing, sales, and marketing systems that function on an interstate basis. Moreover, the FCC's authority extends to billing for intrastate services that cannot readily be separated from the interstate service on which the Commission's jurisdiction is based. The billing for wireless service is an integrated part of the wireless service offering and is subject to the Commission's Title II jurisdiction regarding carrier practices. Because the Commission has plenary authority over interstate service, it clearly may exercise its jurisdiction to assert federal primacy over the billing for wireless service because it is provided without distinction across state boundaries.

In addition, as Cingular and numerous other carriers demonstrated, state regulation of CMRS billing should be preempted because it would negate clear and identifiable federal objectives regarding CMRS. The Commission has long sought to further competitive delivery of wireless service through uniform federal regulatory policies and limited market-oriented regulation. The Commission's broad national framework for CMRS regulation will be compromised by allowing fifty states to regulate the same providers and the same bills. Moreover, the fact that the Commission relies largely on market forces, backed by its enforcement authority under Sections 201 and 202 of the Act, does not justify states stepping in; the courts have affirmed the preemptive effect of the Commission decision to use market forces as a regulatory tool.

Commenters opposing preemption place great weight on Sections 2(b), 414 and 332(c)(3) of the Act, arguing that they reflect Congressional intent to create a dual regulatory structure for CMRS. Cingular and other carriers disposed of those arguments in their comments. Simply put, nothing in these statutory provisions limits in any way the Commission's broad authority to preempt state regulation of CMRS billing. Section 332 merely exempts certain state regulation of intrastate services from the preemption of rate and entry regulation in that provision. Likewise, Section 2(b) of the Act does not restrict the Commission's ability to preempt state regulation of service that is not purely intrastate and, in any event does not preclude FCC regulation of intrastate wireless services. And the "savings clause," Section 414, does not prevent the Commission from validly exercising its authority to establish federal rules and policies, which may in turn preempt state law.

NAAG also cites a laundry list of decisions dealing with preemption under Section 332(c)(3) of the Act, but these cases do not compel a contrary conclusion. The cases, by and large, focus on the scope of certain express preemption provisions in the Act. This proceeding, by contrast, involves the Commission's authority under *Louisiana Public Service* and other cases to preempt state billing regulation over a jurisdictionally mixed service such as CMRS by regulation, rather than express preemption under the Act.

Commenters opposing preemption also argue that preemption is not supported by the Commerce Clause, stating that: (1) the dormant Commerce Clause does not permit preemption where Congress has expressly permitted regulation; and (2) the burden on interstate service of state regulation is not excessive when compared to the local benefit protecting telecommunications consumers. These commenters are wrong on both counts. First, the correct reading of Section 332(c)(3) and other provisions of the Act reveals that Congress has *not* expressly permitted state regulation of CMRS billing. Second, state regulation of CMRS billing would significantly burden interstate commerce while offering no discernable benefit of a uniquely local nature. Comments filed in this proceeding demonstrate that the burden of complying with fifty or more state, district, and territorial billing laws would be enormous. More important, consumers would not benefit from such regulation, but would ultimately have to bear the cost and encounter delays in the availability of new services because of the complexity of billing for such services in accordance with multiple states' rules.

NAAG and NASUCA argue that states may not be prohibited from enforcing their own laws of general applicability and that such laws may not be preempted even as applied in specific cases. The comments of Cingular and others demonstrate that CMRS billing practices should be regulated exclusively by FCC policies, rather than the laws of the various states, as interpreted and applied by judges of general jurisdiction and lay juries. Consequently, the Commission can and should make clear that while its preemption of state regulation of CMRS bills and billing practices does not generally bar states from enforcing their laws of general applicability, it does bar applications of such laws that would have the effect of regulating CMRS billing. Similar to the *Wireless Consumer Alliance* decision, the Commission should urge courts and other tribunals to focus on the nature of the claims and the effect of granting the relief requested in assessing whether a particular application of state law will have the effect of frustrating the federal billing scheme.

The Oklahoma Corporation Commission ("OCC") supports an enforcement regime similar to that established for slamming where states are permitted to enforce the Commission's rules and standards. Cingular disagrees with the OCC; the Commission's slamming rules are not an appropriate regulatory model for billing regulation. Moreover, state commissions should not enforce the Commission billing rules, and delegating such decision-making to state commissions, absent Congressional authorization, appears to be unlawful.

The Arizona Corporation Commission ("ACC") and NAAG take the surprising position that the Commission should now reconsider its finding in the *Declaratory Ruling* that state regulation of CMRS line items are preempted under Section 332(c)(3). These arguments are procedurally improper and should be disregarded. First, this basic question is now pending on appeal before the 11th Circuit and has no place in this portion of the Commission's Truth-in-Billing proceeding. Second, to secure reconsideration of the *Declaratory Ruling* these parties should have filed a Petition for Reconsideration pursuant to Section 405 of the Act and Section 1.106 of the Commission's rules within the required 30 day time period. Neither party made an appropriate or timely filing and the Commission must therefore disregard the portions of comments seeking to revisit the *Declaratory Ruling*. More to the point, however, ACC and NAAG are wrong; the Commission properly concluded in the *Declaratory Ruling* that Section 332(c)(3)(A) preempts state laws requiring or prohibiting the use of line item charges by CMRS providers and is necessary to promote nationwide competition.

Other Issues. Cingular supports the more narrow definition of mandated charges for wireless service, which would include only those charges that are required to be collected from customers and remitted to the government or its designated agency. As Cingular demonstrated in its Comments, this definition is consistent with Commission precedent and with the AVCs to which three of the largest nationwide carriers are parties. This definition already has been incorporated into the billing systems of carriers serving the majority of wireless subscribers. Adopting a different definition now would cause confusion among this large group of consumers. There also is broad support for the more restrictive definition of mandated charges for wireless services both within the wireless industry and among state governmental filers, their representative organizations, and consumer groups.

Cingular supports the Commission's proposal to require that mandated charges be separated from all other charges on wireless customers' bills. This requirement is consistent with the AVCs, and promotes the purposes of the truth-in-billing rules – to reduce consumer confusion – because it enables consumers to distinguish between charges that *must* be recovered from consumers and those that carriers *choose* to pass along. There also is broad support for this proposal among the wireless industry, state governmental filers, and consumer groups.

Cingular disagrees with suggestions by NAAG and NASUCA that the Commission should adopt a third category of charges to separately reflect certain discretionary charges under labels such as "carrier add-ons" or "carrier imposed charges." There is no evidence that such an additional category of charges on customer bills is necessary. Indeed, such a requirement would make bills more lengthy and complex and, as the Commission has recognized, could actually increase consumer confusion.

Cingular disagrees with those commenters such as NAAG, NASUCA and Consumer Groups who suggest that the use of charges such as "regulatory assessment fees" or "cost recovery charges," or other similarly-labeled charges, is *per se* misleading in violation of Section 64.2401(b) of the Commission's Rules. Those same commenters also assert, erroneously, that the combination of multiple regulatory programs into a single cost-recovery line item is unreasonable in violation of Section 201(b) of the Communications Act. Such across-the-board findings cannot, and should not, be made. The Commission must evaluate particular line items pursuant to the policies that it has established to determine whether a charge is misleading or unreasonable. The Commission must look to the line item itself as well as any accompanying disclosures and descriptions. A line item that accurately discloses its purpose, is segregated from mandated charges, and is not represented or implied to be a mandated or government-required charge cannot be said to be misleading. NAAG, NASUCA and the Consumer Groups do not provide any evidence supporting their proposals. In fact, their proposals are at odds with the Commission's own finding that combined line items may be preferable to single-purpose line items because of their simplicity. Further, an across-the-board prohibition of the use of such charges would violate carriers' First Amendment rights, because the remedy would not be narrowly drawn to address the government's asserted interest.

Cingular supports the adoption of disclosure requirements for wireless carriers that are consistent with the AVCs. Carriers representing the majority of wireless subscribers already are parties to the AVCs and have implemented those disclosure requirements. The requirements reflect the balance that was struck with Attorneys General of 33 states who enforce their respective state consumer protection laws. There is no evidence in the record to support upsetting this balance. For example, suggestions that the Commission require carriers to disclose the precise amount of mandatory or discretionary charges, limit them to a cap, or require that estimates of such charges be no more than 10% less than the actual surcharge, fail to recognize that carriers have no control over, or ability to predict, many of these charges. The AVCs reflect this circumstance, and provide carriers with the necessary flexibility to recover these costs. In addition, commenters who ask the Commission to impose additional record-keeping or verification obligations on carriers with respect to their compliance with the disclosure requirements fail to demonstrate why the Commission's existing complaint process is insufficient for purposes of enforcing the requirements.

Further, Commenters who support a lengthy cancellation period in the context of disclosure requirements confuse the purposes underlying cancellation periods and disclosure requirements. Cancellation periods represent a response to consumer demand for an opportunity to reconsider their purchase. Disclosure requirements, in contrast, are intended to promote consumer understanding of billing statements. Adherence to the disclosure obligations makes it unnecessary to provide consumers with a trial period related solely to billing format and content.

Finally, Cingular disagrees with proposals that, while largely consistent with the AVCs, contain twists that do not promote the public interest. Specifically, the AVC disclosure requirements already apply to new customers and to existing customers when they extend service for a new term; add a line, handset or account; or change their rate plan. But NASUCA suggests that they also should apply when a customer adds a service component to his or her plan. The costs associated with the AVCs' disclosure obligations, however, far outweigh the benefits of such disclosures in the context of a minor change to a plan which does not otherwise trigger the AVCs' disclosure requirements. In addition, the AVCs require that carriers notify agents of the disclosure requirements, provide advertising materials that are consistent with those requirements, and not request that an agent take any steps that would violate the requirements. NASUCA, however, would go further and require that carriers be held liable for their agents' compliance with the disclosure requirements. The proposal fails to acknowledge the difficulty in holding carriers liable for third-party actions, particularly in the context of pre-existing agreements. Matters of liability are better left to private contractual negotiations, as the AVCs recognize.

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REPLY COMMENTS

Cingular Wireless LLC ("Cingular") hereby submits these reply comments on the *Second Further Notice of Proposed Rulemaking* released in the above-captioned proceeding on March 18, 2005.[1]

DISCUSSION

I. THE COMMENTS SHOW THAT CMRS BILLING PREEMPTION IS BOTH NECESSARY AND LEGALLY JUSTIFIED

A. Preemption of State Regulation of CMRS Billing Is Necessary

In the *Second Further Notice*, the Commission proposed to reverse its "prior pronouncement that states may enact and enforce more specific truth-in-billing rules"[2] and asked whether it "should preempt . . . state regulation of CMRS carriers' billing practices" beyond the preemption

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1 *Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* CC Docket 98-170, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55 (Mar. 18, 2005) (referred to herein as "*Second R&O*," "*Declaratory Ruling*," and "*Second Further Notice*," respectively).

2 *Second Further Notice* at ¶ 51.

of "line item" regulations recognized in the *Declaratory Ruling*.[3] Numerous commenters strongly supported preemption of state CMRS billing regulation and urged the Commission to modify Section 64.2400(c) of its rules to reflect that states are preempted from regulating CMRS billing.[4] These commenters showed that uniform, nationwide billing regulations serve the public interest by promoting competition and helping carriers reduce costs while at the same time protecting consumers' important interests in obtaining clear and accurate information on which to base purchase decisions providing them with protection against false or deceptive billing practices.[5]

By contrast, the National Association of Attorneys General, National Association of State Utility Consumer Advocates, National Association of Regulatory Utility Commissioners, certain state utility commissions and a coalition of consumer groups all oppose the Commission's tentative conclusion.[6] They maintain that preemption of state billing regulation would somehow eliminate or hamper the "strong, specific, enforceable consumer protections . . . needed to prevent" allegedly abusive billing practices.[7]

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3 *Id.* at ¶ 50.

4 *See* Comments of Cingular Wireless LLC at 19-30; Comments of CTIA – The Wireless Association ("CTIA") at 19-23; Comments of Sprint Corporation ("Sprint") at 2; Comments of Verizon Wireless ("Verizon Wireless") at 5, 10-16.

5 *Id.*

6 *See* Comments of the National Association of Attorneys General ("NAAG") at 14-29; Initial Comments of the National Association of State Utility Consumer Advocates ("NASUCA") at 22-50; Initial Comments of the National Association of Regulatory Utility Commissioners ("NARUC") at 6-14; Comments of the Arizona Corporation Commission ("ACC") at 2-10; Comments of the Public Service Commission of the State of Missouri ("Missouri PSC") at 7-8; Initial Comments of Association of American Retired Persons, Asian Law Caucus, Consumers Union, Disability Rights Advocates, National Association of State PIRGS, National Consumer Law Center ("Consumer Groups") at 12-24.

7 NAAG Comments at 4, 24-25 ("The pro-competitive federal scheme . . . is entirely consistent with – *and indeed depends on – state consumer protection regulations that foster fairness in the marketplace*") (emphasis supplied).

This argument is flawed and proceeds from the erroneous assumption that state regulators know better than the FCC how to look out for consumers' interests.[8] The fact is that the FCC unquestionably has the authority and ability to safeguard consumers' interests. Indeed, Cingular showed in its comments that the Commission has powerful tools to regulate CMRS billing and protect consumers from abuses — Sections 201, 202, and 332 of the Act — and it has proved its willingness and ability to exercise that authority.[9]

The Commission has established "broad, binding principles to promote truth-in-billing rather than mandate detailed rules that would rigidly govern the details or format of carrier billing practices."[10] These principles require that consumer telephone bills: (1) be clearly organized, clearly identify the service provider, and highlight any new providers; (2) contain full and non-misleading descriptions of charges that appear therein; and (3) contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or to contest charges on the bill.[11] The Commission applied the principles to all carriers, including wireless

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[8] The opponents of preemptive FCC standards, in essence, argue that the FCC demonstrated its inability to protect consumers by preempting state regulation of line items on CMRS bills under Section 332(c)(3) of the Act. NAAG, for example, states that "[t]elecommunications remain a top consumer protection issue for state Attorneys General Offices" and that "the heart of much consumer confusion and related complaints is the carriers' practice of incorporating carrier add-on charges as line items to the bills of CMRS consumers to mask the true price of the services they provide. . . . In addition, the carriers' bills often use misleading terms to describe these carrier add-on charges." NAAG Comments at 3-4. NARUC similarly emphasizes its belief that consumers "are clearly confused by the way carriers currently list monthly end-user charges on billing statements." NARUC Comments at 2. The Consumer Groups complain that "[o]ne of the major factors contributing to consumers' frustration with their cell phone service is the ubiquitous use of deceptive, misleading, or confusing line-item charges on monthly bills." Consumer Groups at 3. The Commission, however, has fully taken consumers' interests into account in finding that the use of line items is a reasonable practice and fully permissible. *See Declaratory Ruling* at ¶ 23.

[9] Cingular Comments at 6-10.

[10] *Truth-in-Billing and Billing Formats*, 14 F.C.C.R. 7492, 7498 ¶ 9 (1999) ("*TIB Order*").

[11] *Id.*, 14 F.C.C.R. at 7496 ¶ 5; 47 C.F.R. § 64.2401(b).

carriers, and intended "for these obligations to be enforceable to the same degree as other rules."[12]

Initially, the Commission intentionally relied on the competitive nature of the CMRS industry and allowed carriers to determine how these principles would work in practice for CMRS carriers and their customers. In the Commission's view, this regulatory structure reflected the appropriate balance of the "bedrock consumer protection obligations of common carriers" codified by Sections 201 and 202 of the Act,[13] the pro-competitive and deregulatory objectives of the Act, and carriers' First Amendment rights.

In the *Second R&O,* however, the Commission took further steps to protect consumers based on a realistic assessment of the evolving CMRS marketplace when it: (1) subjected CMRS carriers to the requirement of 47 C.F.R. § 64.2401(b) that billing descriptions be brief, clear, non-misleading and in plain language; (2) reiterated that it is misleading to represent discretionary line item charges in any manner that suggests such line items are taxes or charges required by the government; and (3) clarified that the burden rests upon the carrier to demonstrate that any line item that purports to recover a specific governmental or regulatory program fee must conform to the amount authorized by the government to be collected.[14]

The Commission is now taking further steps to protect consumers because its assessment of the record indicates that more detailed nationwide requirements may be warranted. The *Second Further Notice* explores important billing issues related to the treatment of mandated and non-mandated charges, point-of-sale disclosure requirements, and the recovery of costs associated with multiple regulatory programs in a single line item. In effect, the Commission has pro-

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12 *TIB Order* at 7499, 7501 ¶¶ 9 & 13; *see also* 47 C.F.R. §§ 64.2400 and 64.2401.

13 *TIB Order*, 14 F.C.C.R. at 7502 ¶ 19, n.32, quoting *PCIA Petition for Forbearance For Broadband PCS,* 13 F.C.C.R. 16857, 16865 ¶ 15 (1998) ("*Wireless Forbearance Order*").

14 *Second R&O* at ¶¶ 16-20.

posed regulating the very matters that most concern NAAG, NARUC, NASUCA and the Consumer Groups.

These opponents of exclusive federal standards argue that FCC rules are not good enough, and state regulation of CMRS billing is necessary. Their arguments that such matters should be left to the states essentially amount to second-guessing the FCC in its area of competence – the treatment of services that are jurisdictionally interstate.[15] No state has shown that its residents are uniquely in need of protections beyond those proposed by the Commission; no state has shown that the residents of particular states will be ill-served by the proposed rules. Each state is simply trying to maintain the ability to determine the level of protection needed while opposing the FCC's exercise of its full authority despite the inherently interstate nature of CMRS.

Some commenters raised issues concerning how the standards for CMRS billing should be enforced. The ACC, for example, suggests that preemption will deny consumers a local forum for complaints and resolution of their complaints.[16] The ACC is incorrect. Preemption of state regulation of CMRS billing will not deprive consumers of a local complaint mechanism. State PUCs would be able to receive complaints and seek resolution from the FCC.

Moreover, preemption will not deny consumers access to local advocates to assist in resolving their billing-related complaints. As several commenters point out, state public service commissions or Attorneys General are not barred from acting to protect consumers.[17] Section 208 of the Act specifically authorizes any "person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier

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[15] *See infra* text at Section I.B.2.

[16] ACC Comments at 5.

[17] *See* CTIA Comments at 30-31; Comments of Nextel Communications, Inc. and Nextel Partners, Inc. ("Nextel") at 30-32; Sprint Comments at 8; Verizon Wireless Comments at 32.

subject to this act" to file a complaint with the Commission.[18] If relief is warranted, the FCC can then act in a consistent manner to the benefit of consumers nationwide, not just those in a single state. Thus, preemption of state CMRS billing regulation will simply ensure that consumer billing complaints will be adjudicated in a federal forum, allowing for a consistent application of uniform billing standards, rather than balkanizing billing regulation across more than fifty regulatory jurisdictions.

In other words, the Commission is not faced with a stark choice between protecting consumers and not protecting consumers, as NAAG, NARUC, NASUCA and others suggest. Rather, the question boils down to whether regulation of CMRS billing should be undertaken on a uniform, equitable, nationwide basis, or whether fifty states should regulate the same providers and the same bills according to various standards and be permitted to impose different even more stringent requirements, as NARUC suggests.[19] The fact is that the FCC needs to impose uniform, exclusive standards on CMRS billing to ensure that states cannot frustrate the FCC's regulatory power over carriers. The comments filed in response to the *Second Further Notice* make clear that it is essential that CMRS billing be regulated on a uniform, nationwide basis and thus preemption of state CMRS billing regulation is warranted.

CMRS carriers offer a wide variety of popular calling plans that provide customers with nationwide service, covering usage throughout nationwide extended networks and allowing calls from points across the country to anywhere else.[20] These plans are offered by all major carriers and each carrier markets the plans nationwide at uniform rates in a highly competitive environ-

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[18] 47 U.S.C. § 208(a).

[19] NARUC Comments at 2.

[20] Cingular Comments at 21-24; CTIA Comments at 19-23; Comments of Dobson Communications Corporation ("Dobson Communications") at 2; Nextel Comments at 24-25; Sprint Comments at 5-6; Verizon Wireless Comments at 9-12.

ment. Furthermore, CMRS typically is billed on a unitary basis in which monthly and per-unit charges cover interstate and intrastate services without distinction. In other words, neither rates nor bills of carriers are separable into purely interstate and intrastate components for regulatory purposes. There is instead a single bill that pertains to the *rates* for both interstate and intrastate services, without regard to where the customer may have used his or her wireless device or the origination or termination of the call.

This evolution in the CMRS market has resulted in carriers developing nationwide service plans, customer service training, billing systems, and 'back office' management tools. These developments create significant economies of scale that clearly redound to the benefit of consumers by helping carriers to reduce costs and enabling customers to roam at progressively lower prices. As a consequence, there can be no real dispute that uniform, nationwide regulation, not state-by-state regulation, is the appropriate mechanism for regulating CMRS billing. As Verizon Wireless put it, only "federal rules can reach all wireless carriers and assist all wireless customers."[21] No state has proven otherwise.

Allowing billing regulations to vary on a state-by-state basis would completely undermine the benefits of nationwide services and rate plans, imposing enormous new costs that will ultimately have to be borne by customers in every jurisdiction.[22] As Cingular demonstrated in its comments, even if only one state's regulations applied to any single bill, it would be extraordinarily costly and difficult for Cingular to develop separate billing system variants to address each jurisdiction's regulations, and it would probably not be possible to design a single billing system

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21 Verizon Wireless Comments at 12.

22 Cingular Comments at 12-16; CTIA Comments at 31-33; Nextel Comments at 29-31; Sprint Comments at 5-6; Verizon Wireless Comments at 12-16.

that could meet every state's standards in a single bill and still comply with federal standards.[23] In sum, consumers would not benefit from state-by-state regulation; they would ultimately have to bear the cost and, in all likelihood, receive bills that are no clearer or more accurate; they would also suffer from delayed availability of new services because of the complexity of billing for such services in accordance with multiple states' rules. Thus, continued state regulation of CMRS billing makes no sense under these circumstances and federal preemption is warranted.

B. The Commission Has Ample Legal Authority to Adopt a Uniform National Regulatory Framework for CMRS Billing and to Preempt State Billing Regulations

NAAG, NASUCA, NARUC, ACC, Missouri PSC, and the Consumer Groups virtually ignore the practical public interest benefits underlying a uniform, nationwide CMRS billing regulatory regime. Instead, these commenters raise a series of spurious arguments alleging that the Commission lacks legal authority to preempt state billing regulation.[24] Specifically, these commenters argue that the Commission lacks authority to preempt the states in this area because: (1) there is no express statutory preemption;[25] (2) the Commission has not occupied the field of billing regulation; [26] (3) the record is insufficient to support conflict preemption; [27] and (4) the Commerce Clause does not support preemption. [28]

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[23] Cingular Comments at 12-16.

[24] *See* NAAG Comments at 14-29; NASUCA Comments at 22-50; NARUC Comments at 6-14; ACC Comments at 2-10; Missouri PSC Comments at 7-8; Consumer Groups Comments at 12-24.

[25] *See* NAAG Comments at 15-21; NASUCA Comments at 40-42; NARUC Comments at 8-9.

[26] *See* NAAG Comments at 21-23; NASUCA Comments at 26-29.

[27] *See* NAAG Comments at 23-25; NASUCA Comments at 26.

[28] *See* NAAG Comments at 27-29; NASUCA Comments at 31-33; NARUC Comments at 11-12.

NAAG, NASUCA, and NARUC assert further that any preemption analysis must begin with the understanding that there is a legal presumption against preemption in this context.[29] They also argue that, in dealing with preemption by federal agencies, the "touchstone" is whether Congress expressed its intent to preempt state law.[30] In essence, they claim that the Commission is powerless to override state law, even where it stands as an obstacle to a valid federal objective, absent some clear expression of Congressional intent to preempt.[31]

These arguments lack merit. The Commission has ample authority to preempt state law that would obstruct the uniform regulation of wireless billing.

1. The Commission acting within its statutory authority may pre-empt state CMRS billing regulation

All parties agree that the Supreme Court's decision in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 344 (1986), is the landmark decision dealing with Commission preemption of state telecommunications regulation.[32] Therein, the Court held that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation"[33] and thereby "render unenforceable state or local laws that are otherwise not inconsistent with federal law."[34] Where state law is preempted by federal regulation, however, "a 'narrow focus on Congress' intent to supersede state law [is] misdirected," for a "pre-emptive regulation's force does

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29 NAAG Comments at 13; NASUCA Comments at 25-26; NARUC Comments at 9;

30 NASUCA Comments at 25; Consumer Groups Comments at 22.

31 NASUCA Comments at 26; *see also* NAAG Comments at 14; NARUC Comments at 9; Consumer Groups Comments at 22.

32 *See* ACC Comments at 9; NAAG Comments at 14; NASUCA Comments at 30; NARUC Comments at 13.

33 *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355, 368 (1986).

34 *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) citing *Louisiana Pub. Serv. Comm'n*, 476 at 369.

not depend on express congressional authorization to displace state law."[35] Further, there is no "'presumption against pre-emption,'" in such cases.[36] Rather, the Court "must interpret the statute to determine whether Congress has given [the agency] the power to act as it has, and [it] does so without any presumption one way or the other."[37] In sum, the inquiry into whether the Commission may preempt state CMRS billing does *not*, as the states would have one believe, involve a presumption against preemption or a question of Congressional intent. The proper test is "whether the federal agency has properly exercised its own delegated authority."[38]

As noted above, and detailed in Cingular's comments, there is no dispute that the Commission's billing regulations are firmly grounded in its broad authority over wireless telecommunications under Sections 2(a), 201, 202, and 332 of the Act.[39] In other words, the Commission is acting well within the scope of its delegated authority. The question is therefore whether preemption of state CMRS billing regulation is a proper exercise of that authority.[40] The comments in this proceeding establish that preemption of state regulation of CMRS is indeed a proper exercise of the Commission's statutory authority.

2. Preemption is appropriate because state regulation would frustrate Federal policy goals and objectives

As Cingular and numerous other carriers demonstrated, state regulation of CMRS billing should be preempted because it would negate clear and identifiable federal objectives regarding

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35 *City of New York*, 486 U.S. 64 quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982).

36 *New York v. FERC*, 535 U.S. 1, 18 (2002).

37 *Id.*

38 *Id.*

39 Cingular Comments at 6-10.

40 *Id.*; *see also* CTIA Comments at 42-43; Verizon Wireless Comments at 21-22; Nextel Comments at 26-27.

CMRS.[41] In short, the Commission has now made a determination that federal regulation of CMRS billing is necessary to further the fundamental Congressional objectives of developing and maintaining nationwide, competitive wireless telecommunications services.[42] To that end, the Commission has held already that state attempts to regulate particular line items constitute rate regulation in violation of Section 332(c)(3) of the Act.[43] The same reasoning governs the remainder of the bill, which is nothing less than the carrier's mechanism for collecting charges for jurisdictionally mixed, albeit inseverable, services that should be exempted from state regulation.

When it is not possible to separate a given service into interstate and intrastate components that can be regulated separately at the federal and state levels, the Commission's exercise of its authority over the interstate aspects of the service may even extend to the intrastate aspects of the service as well, preempting state law on the ground of inseparability.[44] As the courts have recognized:

> Commission preemption of state regulation is thus permissible when (1) the matter to be regulated has both interstate and intrastate aspects. . .; (2) Commission preemption is necessary to protect a valid federal regulatory objective . . . ; and (3) state regulation would 'negate the exercise by the Commission of its own lawful authority' because regulation of the interstate aspects of the

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41 Cingular Comments at 5-6, 24-27; CTIA Comments at 39-42; Nextel Comments at 26-31; Sprint Comments at 8-11; Comments of T-Mobile USA, Inc. ("T-Mobile") at 11-16; Comments of USA Mobility, Inc. ("USA Mobility") at 3-9; Verizon Wireless Comments at 18-24. Carriers also cited to the doctrines of 'express preemption" and 'occupation of the field' preemption as providing the Commission authority to preempt states from regulating CMRS billing. *See* CTIA Comments at 38; Verizon Wireless Comments at 16-20.

42 Cingular Comments at 21-24; CTIA Comments at 19-24; Nextel Comments at 21-27; Verizon Wireless Comments at 5-9.

43 *Declaratory Ruling* at ¶ 30.

44 *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368.

> matter cannot be 'unbundled' from regulation of the intrastate aspects.[45]

Put another way, absent "a practical way to separate the service" into exclusively intrastate and interstate components, the state's regulation of a jurisdictionally mixed service that is already subject to Commission regulation "produces a direct conflict with our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services," requiring preemption.[46]

NAAG, NASUCA, NARUC and others disagree, arguing that there is no conflict between the important federal interests represented by uniform nationwide billing regulation and continued state regulation of CMRS billing.[47] Indeed, some commenters suggest that there can be no such conflict because the *Second Further Notice* does not point to specific instances of state regulation that conflict with the Commission's regulations.[48] These commenters miss the point. The Supreme Court has held that a federal agency may preempt state laws and regulations and thereby "*render unenforceable state or local laws that are otherwise not inconsistent with federal law*."[49]

Furthermore, a federal agency may choose to rely on market forces to permit a light-handed regulation or no regulation and may still preempt states from stepping into that intentionally created void. In *Computer and Communications Industry Association v. FCC*, the Court

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[45] *Maryland PSC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990), quoted in *Vonage Holdings Corp. Petition for Declaratory Ruling*, 19 F.C.C.R. 22404, 22415 ¶ 19 (2004) (footnotes omitted).

[46] *Vonage Holdings Corp.*, 19 F.C.C.R. at 22417 ¶ 22.

[47] *See* Consumer Groups Comments at 21-22; ACC Comments 9-10; NAAG Comments at 23; NASUCA Comments at 26; NARUC Comments at 9-10.

[48] ACC Comments at 9; NAAG Comments at 23-24. The comments of Cingular and Verizon Wireless, however, both provide substantive examples of state regulatory or legislative initiatives with regard to CMRS billing. *See* Cingular Comments at 27-30; Verizon Wireless Comments at 17-20.

[49] *City of New York*, 486 U.S. at 63-64 (emphasis supplied) citing *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369.

found that the Commission had authority to preempt state tariffing requirements for customer premises equipment. [50] The Commission justified its preemption on a finding that its "policy of promoting the 'efficient utilization and full exploitation of the interstate telecommunications network' is furthered by fostering competition in the CPE market and giving consumers an unfettered selection of CPE," and "the inclusion of CPE in charges for intrastate transmission service will certainly influence the consumer's choice of CPE."[51] The Court upheld the Commission's judgment, finding that:

> Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.[52]

The Court also rejected arguments that preemption of state CPE tariffing requirements was unlawful, finding unpersuasive the claims that the decision to detariff created a regulatory vacuum and that preemption of state regulation can only be accomplished by affirmative regulation that occupies the field.[53] In the Court's view, such arguments

> misapprehend the Commission's actions. Although the Commission has discontinued Title II regulation of CPE, it has substituted a different, affirmative regulatory scheme through its ancillary jurisdiction. Furthermore, we perceive no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction. It is clear to us that the *Computer II* regulations embody a comprehensive federal regulatory scheme, including rules governing the marketing of CPE by common carriers. We agree with the Second Circuit: 'Federal regulation need not be heavy-handed in order to preempt state regulation' . . . . We believe that Congress has empowered the Commission to adopt policies to deal with new developments in the communications in-

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50 *See id.; Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 215 (D.C. Cir. 1982).

51 *Computer and Communications Indus. Ass'n.*, 693 F.2d at 214-15.

52 *Id.* at 214 (footnotes omitted).

53 *Id.* at 217.

> dustry and that the policy favoring regulation by marketplace forces embodied in *Computer II* is neither arbitrary, capricious, nor an abuse of discretion. With this holding our review of the wisdom of state preemption is at an end.[54]

Similarly, in *Cellular Phone Taskforce v. FCC*, the Second Circuit upheld the Commission's rules governing human exposure to radio frequency ("RF") emissions.[55] The Commission set exposure limits consistent with "its mandate to 'balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.'"[56] The Court ruled that the Commission has broad preemption authority under the Act to preempt state rules that upset the regulatory balance established by the Commission.[57]

This same analysis applies to the Commission's regulation of CMRS billing. The Commission has imposed general, substantive standards governing billing clarity, content, layout, and accuracy on CMRS providers and has elected to enforce those standards on a case-by-case basis. In essence, the Commission has chosen to rely on market forces, backed up by its Sections 201 and 202 enforcement authority, rather than codify detailed regulations. This judgment is well within the Commission's broad authority over billing matters. It follows that any state regulation that interferes with this valid federal policy must be preempted.[58]

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54 *Id.* (footnotes omitted).

55 *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000).

56 *Id.* at 92.

57 *Id.* at 96.

58 "FCC regulations must preempt any contrary state regulations where the efficiency . . . of the national communications network is at stake . . . ." *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1046 (4th Cir. 1977).

3. Nothing in the Act Requires the Commission to Preserve a State Role in Regulating CMRS Billing Practices

NAAG, NASUCA, NARUC and others place great weight on Sections 2(b), 414 and 332(c)(3) of the Act, arguing that they reflect Congressional intent to create a dual regulatory structure for CMRS.[59] Cingular and other carriers have already dealt with identical arguments in their comments.[60] Simply put, nothing in these statutory provisions limits in any way the Commission's broad authority to preempt state regulation of CMRS billing.

NAAG also cites a laundry list of court decisions dealing with preemption under Section 332(c)(3) of the Act, but these cases do not compel a contrary conclusion.[61] Indeed, the cases, by and large, focus on the scope of certain express preemption provisions in the Act. For example, the *Communications Telesystems International* case deals only with the scope of the preemption language in Section 253(a) of the Act.[62] The *Spielholz* case deals with the question of whether an award of damages or restitution based on state false advertising claims is unlawful rate regulation preempted by Section 332(c)(3).[63] The *Fedor* and *Phillips* decisions deal with questions of removal to federal court and whether Section 332(c)(3) constitutes "complete preemption" for removal purposes, not whether the FCC can, by regulation, preempt certain state laws.[64] This proceeding, by contrast, involves the Commission's authority under *Louisiana*

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59 NAAG Comments at 14-20; NASUCA Comments at 40-42; NARUC Comments at 9-14; Consumer Groups Comments at 14-18.

60 Cingular Comments at 30-34; Nextel Comments at 20-25; Verizon Wireless Comments at 27-29.

61 NAAG Comments at 17-20.

62 *Communications Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1016-17 (9th Cir. 1999).

63 *Spielholz v. Superior Court of Los Angeles County*, 104 Cal. Rptr. 2d 197 (Cal. Ct. App. 2001).

64 *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069 (7th Cir. 2004) (holding that allegations that a carrier breached state contract law by deferring billing for calls into periods after the date of the calls were not preempted by Section 332(c)(3) so as to permit removal to federal court);

(footnote continued on next page)

Public Service and other cases to preempt state billing regulation over a jurisdictionally mixed service such as CMRS by regulation, rather than express preemption under the Act.

NAAG's reliance on the Commission's decision in *Wireless Consumers Alliance*[65] is similarly unavailing.[66] NAAG inaccurately portrays that decision as one where the Commission asserted, without qualification, "the broad scope of 'terms and conditions' and the narrow scope of rate regulation in the context of telecommunications preemption" under Section 332(c)(3) of the Act.[67] In fact, the Commission there made clear that while damage awards against CMRS providers under state law do not *necessarily* constitute rate regulation, "a court will overstep its authority under Section 332" if it attempts to adjudicate the reasonableness of a rate in relation to the service offered.[68] The Commission emphasized: "It is the substance, not merely the form of the state claim or remedy, that determines whether it is preempted under Section 332."[69]

4. State regulation would unduly impair interstate commerce

Citing the Commission's recent *Vonage Decision,* 19 F.C.C.R. 22404 (2004), Cingular has demonstrated that preemption of state regulation of CMRS billing is supported by the impor-

(footnote continued)

Phillips v. AT&T Wireless, 2004 U.S. Dist. LEXIS 14544 (S.D. Iowa 2004) (holding that allegations that a carrier breached state unfair debt collection laws by charging early termination fees were not preempted by Section 332(c)(3) so as to permit removal to federal court). *But see Bastien v. AT&T Wireless Services, Inc.* 205 F.3d 983 (7th Cir. 2000) (state-law claims based on alleged lack of CMRS coverage completely preempted). The Supreme Court's recent clarification of the complete preemption doctrine in *Beneficial Nat'l. Bank v. Anderson*, 539 U.S. 1 (2003), invalidates the analysis of many of the decisions concluding that the Communications Act does not "completely preempt" state law claims challenging CMRS rates or entry for removal purposes. Furthermore, the complete preemption doctrine "functions as a narrowly drawn means of assessing federal removal jurisdiction," *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir., 2001) (citation omitted); it does not speak to whether the Commission can and should preempt state billing regulation based upon traditional preemption doctrines.

65 *Wireless Consumers Alliance*, 15 F.C.C.R. 17021 (2000).

66 NAAG Comments at 20-21.

67 NAAG Comments at 20.

68 *Wireless Consumers Alliance*, 15 F.C.C.R. at 17041 ¶ 39.

69 *Id*. at 17036 ¶ 28, citing with approval *Bastien*, 205 F.3d at 983.

tant Constitutional principles embodied in the Commerce Clause.[70] NAAG, NASUCA, NARUC and others dispute this position, arguing that: (1) the dormant Commerce Clause does not permit preemption where Congress has expressly permitted regulation; and (2) the burden on interstate service of state regulation is not excessive when compared to the local benefit protecting telecommunications consumers.[71] These commenters are wrong on both counts.

First, Congress has not expressly permitted state regulation of CMRS billing. As Cingular and numerous other commenters have pointed out, when correctly read, the "other terms and conditions" language in Section 332(c)(3) of the Act, does *not* affirmatively authorize state regulatory authority over the terms and conditions of CMRS service, but merely exempts any such authority that states already had from the preemptive effect of Section 332(c)(3).[72] Moreover, states never had authority over interstate service, and they never had authority over intrastate service rendered in a different state. CMRS bills, however, inseparably cover interstate service, intrastate service in the billing state, and intrastate service rendered entirely within other states. The states cannot deny that the Commission has full authority to address such bills, and no state has pointed to any source of authority for states to regulate bills for interstate services or service rendered wholly in another state. The FCC is the only entity with undisputed jurisdiction over bills involving service that is not limited to a single state, and in exercising its authority over bills that cannot be separated jurisdictionally. It can and should preempt any residual authority that a state may have over the same bill's intrastate aspects.

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[70] Cingular Comments at 35-39; *see also* CTIA Comments at 29-30 citing *Vonage*, 19 F.C.C.R. at 22428-29 ¶¶ 38-39; Verizon Wireless Comments at 23-24 citing *Vonage*, 19 F.C.C.R. at 22416-18 ¶¶ 20-22.

[71] NAAG Comments at 27-29; NASUCA Comments at 31-33; NARUC Comments at 11-12.

[72] Cingular Comments at 31-32; *see also* Nextel Comments at 20-25; Verizon Wireless Comments at 27-29.

Second, the burdens of state regulation of CMRS billing would significantly burden interstate commerce while offering no discernable benefit of a uniquely local nature. As Cingular demonstrated in its Comments, state regulation of CMRS billing would impose enormous costs on CMRS providers.[73] Moreover, these costs and burdens are exacerbated by the fact that CMRS is a wireless service that operates without regard to state boundaries. CMRS, like the VoIP services at issue in *Vonage*, "is not constrained by geographic boundaries and cannot be excluded from any particular state," and, therefore, "inconsistent state economic regulation could cripple development" of the service.[74]

By contrast, there is no significant local benefit achieved by subjecting carriers to billing format requirements that go beyond the requirements imposed by the Commission. No state has identified any unique characteristics of its citizens that makes it necessary to single them out for protections that other states' citizens do not deserve or need. As discussed above, the Commission's billing regulations are designed to protect the interests of consumers nationwide, and provide legal remedy for unlawful billing practices through Sections 201, 202, 207, and 208 of the Act. A bill that is clear and non-misleading in accordance with federal standards does not somehow become unclear and misleading with respect to services for which the bill is rendered within some particular state. In sum, the net effect of continuing state regulation of CMRS billing will be to impose a substantial burden on interstate commerce with no identifiable local benefit.

II. STATE LAWS OF GENERAL APPLICABILITY ARE NOT PREEMPTED EXCEPT WHEN APPLIED IN A MANNER THAT CONFLICTS WITH THE COMMISSION'S NATIONWIDE BILLING OBJECTIVES

As part of its inquiry into whether to further preempt state billing regulation, the Commission asked commenters "to delineate what they believe should be the relative roles of the

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73 Cingular Comments at 12-19.

74 *Vonage Holdings*, 19 F.C.C.R. at 22429 ¶ 41.

Commission and the states in defining carriers' proper billing practices."[75] In this regard, the Commission tentatively concluded that "the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices."[76]

NAAG and NASUCA argue that states may not be prohibited from enforcing their own laws of general applicability and that such laws may not be preempted even as applied in specific cases.[77] Some carriers appear to agree, emphasizing, without apparent qualification, the importance of the states' role in consumer protection through enforcement of laws of general applicability.[78] CTIA and Verizon Wireless agree there is a role for states through enforcement of general consumer protection laws, but also suggest that preemption may occur in specific cases.[79]

Cingular's position is twofold. First, the Commission can and should preempt states from undertaking affirmative prescriptive regulation of CMRS bills and billing practices. The Commission should, therefore, modify Section 64.2400(c) of its rules to reflect that states are preempted from regulating CMRS billing. In Cingular's view, such preemption would not *categorically* preempt states from enforcing their laws of general applicability regarding matters such as contract law, unfair competition, deceptive trade practices and advertising laws.[80] Recogniz-

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75 *Second Further Notice* at ¶¶ 50, 52.

76 *Id.* at ¶ 53.

77 *See* NAAG Comments at 24-25; NASUCA Comments at 49-50.

78 *See* Comments of United States Cellular Corporation ("USCC") at 9; T-Mobile Comments at 13, 21-22; Sprint Comments at 2; Comments of AT&T Corp. ("AT&T") at 15 n.26; Comments of the United States Telecom Association ("USTA") at 5.

79 CTIA Comments at 31, n.69; Verizon Wireless Comments at 30-32.

80 Cingular has entered into an Assurance of Voluntary Compliance with Attorneys General of 33 states (the "Cingular AVC") with respect to its marketing, sales, and billing practices. The AVC sets forth disclosure requirements that Cingular follows in connection with the billing for

(footnote continued on next page)

ing that preemption of state billing regulation does not necessarily preempt laws of general applicability is consistent with the Commission's finding that the express preemption of state regulation of CMRS rates and entry does not create a "general exemption for the CMRS industry from the *neutral application* of state contractual or consumer fraud laws."[81]

The second prong of Cingular's position is, as CTIA and Verizon Wireless suggest, that even state rules of general applicability could be applied in such a way as to interfere with the Commission's rules and would therefore be subject to the normal application of conflict preemption.[82] Cingular's Comments specifically articulate this point with regard to the Commission finding that state regulation of CMRS line items is unlawful rate regulation under Section 332(c)(3) of the Act.[83] The Commission should similarly clarify that its preemption of state billing regulation more generally extends to all such regulation of CMRS billing, including indirect regulation that occurs through the application (or misapplication) of state laws of general applicability.

As discussed, CMRS billing practices should be regulated exclusively by FCC policies, rather than the laws of the various states, as interpreted and applied by judges of general jurisdiction and lay juries. As the Commission has observed in a related context,

> since the courts lack the Commission's expertise, developed over decades, in evaluating carriers' practices, carriers would face inconsistent court decisions and incur unnecessary costs. This could

(footnote continued)

and advertising and sale of, the wireless services and features that it provides. Cingular believes that the relevant Attorneys General retain enforcement authority with regard to the AVC.

81 *Southwestern Bell Mobile Systems*, 14 F.C.C.R. 19898, 19903 ¶ 10 (1999).

82 *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (finding that a tort action based upon a claim that automobile manufacturers had a state law duty to install an airbag was preempted because that rule of law "would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives" of federal regulations).

83 Cingular Comments at 39-46.

> result in consumers receiving differing levels of . . . protection depending upon the jurisdiction in which they live. . . .[84]

Therefore, the Commission should make clear in this proceeding that any application of state law of general applicability that would conflict with the Commission's billing regulations for CMRS would be preempted. Moreover, since the determination of whether any particular claim or remedy is consistent with the Commission's billing regulations "must be determined in the first instance by a . . . trial court based on the specific claims before it,"[85] the Commission should provide guidance to courts and other tribunals in evaluating such claims similar to that expressed in *Wireless Consumers Alliance* order. Specifically, the Commission should urge courts and other tribunals considering whether the Commission's billing regulations preempt a particular application of state law to focus on the nature of the claims and the effect of granting the relief requested. Just as under *Wireless Consumers Alliance* a court must determine whether a particular application of state law will have the effect of regulating the reasonableness of rates, a court would need to assess whether a particular application of state law will have the effect of regulating the brevity, clarity, or other aspects of CMRS bills governed by FCC truth-in-billing standards. Where applying state law would result in regulation of matters addressed by the Commission's billing regulations, that application of the state law would be preempted.

III. STATES MAY NOT ENFORCE FEDERAL BILLING REGULATIONS

Citing the Commission's slamming rules as an example, the Oklahoma Corporation Commission ("OCC") argues that the Commission should adopt "an enforcement regime where states are permitted to enforce rules developed by the Commission."[86] OCC argues further that

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[84] *Wireless Forbearance Order*, 13 F.C.C.R. at 16872 ¶ 30.

[85] *Wireless Consumers Alliance*, 15 F.C.C.R. at 17037 ¶ 28.

[86] OCC Comments at 2; *see also* NAAG Comments at 24-25; NASUCA Comments at 49-50.

consumers will benefit from such a partnership between state and federal authorities and carriers would not be unduly burdened.[87] Cingular strongly disagrees with the OCC; the FCC's slamming rules are not the appropriate regulatory model. State commissions should not enforce the Commission billing rules and may not be delegated decision-making authority.[88]

As noted above, the Commission's billing rules are "broad, binding principles" designed to "promote truth-in-billing rather than mandate detailed rules that would rigidly govern the details or format of carrier billing practices."[89] The Commission intentionally left the precise details regarding compliance with these obligations to CMRS carriers themselves to satisfy in a manner that responds to customers' needs consistent with their own capabilities and the demands of the marketplace. For example, Section 64.2401(b) provides that "[c]harges contained on telephone bills must be accompanied by a *brief, clear, non-misleading, plain language description of the service or services rendered*."[90] The details of what disclosures meet the standard are to be determined case by case.

Permitting each state to decide what disclosures are appropriate under this standard would give rise to the same issues that necessitate Commission action to preempt state billing regulation. If each state could give its own meaning to the Commission's standard, there would be no uniformity; there would be balkanized regulation of CMRS billing.

Further, absent express statutory authority, the Commission cannot authorize states to adjudicate disputes under the FCC billing rules or to interpret those rules. That would constitute an unlawful delegation of the Commission's authority. The FCC may not "delegat[e] to another actor almost the entire determination of whether a specific statutory requirement . . . has been

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87 *Id.*

88 *Accord* CTIA Comments at 33-37.

89 *TIB Order*, 14 F.C.C.R. at 7498 ¶ 9.

90 47 C.F.R. § 64.2401(b) (emphasis supplied).

satisfied."[91] While the Commission may authorize outside parties for fact gathering or consultative purposes, it cannot delegate to third parties such as state sovereigns its decision-making authority without clear congressional authorization.[92] "[D]elegating to outside entities increases the risk that these parties will not share the agency's national vision and perspective."[93] This is precisely the risk posed by delegating to the states authority to enforce the Commission's billing rules. Congress has not given the FCC the power to delegate decisionmaking regarding CMRS billing to state regulators.

IV. THE COMMISSION SHOULD NOT RECONSIDER ITS FINDING THAT STATE PREEMPTION OF CMRS LINE ITEMS IS PREEMPTED

ACC and NAAG take the surprising position that the Commission should now reconsider its finding in the *Declaratory Ruling* that state regulation of CMRS line items are preempted under Section 332(c)(3).[94] These arguments are procedurally improper and should be disregarded.

First, the basic question raised by ACC and NAAG is now pending on appeal before the 11th Circuit and has no place in this portion of the Commission's Truth-in-Billing proceeding.[95] Second, to secure reconsideration of the *Declaratory Ruling* these parties should have filed a Petition for Reconsideration pursuant to Section 405 of the Communications Act of 1934 (the "Communications Act") (and Section 1.106 of the Commission's rules) within the 30-day statu-

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91 *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 567 (D.C. Cir. 2004).

92 *Id.*

93 *Id.* at 565.

94 ACC Comments at 2-5; NAAG Comments at 5 ("The Attorneys General . . . strongly urge the Commission to reconsider any approach that would preempt states' efforts" to regulate carrier "add-on" charges). NASUCA also advocates revisiting the basis for the *Declaratory Ruling* but specifically avoids characterizing its request as seeking reconsideration — as it must, given that it has a pending petition for judicial review of the decision.

95 *Nat'l Assoc. of State Util. Comm'n v. Fed. Communications Comm'n,* Petition for Review, No. 05-11682D (filed Mar. 28, 2005).

tory time period.[96] Neither party took such action.[97] Third, reconsideration of the *Declaratory Ruling* is beyond the scope of the issues put on public notice in the *Second Further Notice*. The *Second Further Notice* asks whether the Commission should *expand* its preemption of state regulation of CMRS billing; no mention is made of potentially abandoning the earlier finding that state regulation of CMRS line items is unlawful rate regulation preempted by Section 332(c)(3). The propriety of the FCC's line-item decision is before the courts – not the FCC. The Commission should therefore disregard the portions of comments seeking to reconsider the *Declaratory Ruling*.[98]

The Commission properly concluded in the *Declaratory Ruling* that Section 332(c)(3)(A) preempts state laws requiring or prohibiting the use of line item charges by CMRS providers. Under Section 332(c)(3)(A), and its conforming amendment to Section 2(b),

> no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.[99]

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96 47 C.F.R. §§ 1.106, 1.4

97 The ACC's filing is particularly problematic on this point. ACC raises a number of procedural issues, such as a lack of notice and opportunity for comment that should have been raised either on reconsideration or on appeal. *See* ACC Comments at 2-5. The ACC has apparently done neither.

98 The Commission has repeatedly made clear that a pleading, however titled, that seeks reconsideration of an earlier decision is to be dismissed as an untimely petition for reconsideration if it is filed after the statutory period for seeking reconsideration. *See, e.g., Hispanic Information and Telecommunications Network, Inc.,* 20 F.C.C.R. 801, 805 (2005); *Ultra-Wideband Transmission Systems,* ET Docket 98-153, *Second Report and Order and Second Memorandum Opinion and Order*, 19 F.C.C.R. 24558, 24597 (2004); *Eligibility Restrictions on C Block Licenses in the Broadband Personal Communication Services,* 19 F.C.C.R. 20321, 20326-27 (2004); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, *Order,* 18 F.C.C.R. 7615, 7618 (2003).

99 47 U.S.C. § 332(c)(3)(A).

The Commission has made clear that, for purposes of Section 332(c)(3)(A), the concept of "rates" includes "rate elements" and "rate structures."[100] Moreover, the Commission has repeatedly made clear that line item surcharges are "rate elements."[101] Thus, because line items are elements or structures of CMRS rates, state regulation of such line items is unlawful rate regulation preempted by the express terms of Section 332(c)(3). Finally, the Commission's finding that state prohibitions on line items would frustrate the development of a nationwide rate by carriers and thus interfere with competition for such service is unassailable.

V. THE COMMISSION SHOULD ADOPT A NARROW DEFINITION OF MANDATED CHARGES APPLICABLE IN THE WIRELESS CONTEXT

In its Comments, Cingular urged the Commission to adopt the first of its two proposed definitions for "mandated charges." Thus, mandated charges would include only those charges which carriers are required to collect from subscribers and remit to the government or its designated agency.[102] Cingular explained that this distinction between mandated and discretionary charges is consistent with Commission precedent regarding the recovery of costs associated with regulatory programs, and with the Assurances of Voluntary Compliance ("AVCs") to which

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[100] *Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. at 19907 ¶ 20 (finding "that the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers").

[101] *See, e.g., USF Contribution Order,* 17 FCC Rcd at 24979 ¶ 53 n.133 ("incumbent local exchange carriers are required to recover their federal universal service contribution costs through *a line item*, which may be combined for billing purposes with *another rate element*") (emphasis added); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service*, 15 FCC Rcd 12962, 13057-58 ¶¶ 218-19 (2000) (approving plan permitting local phone companies to establish a "*separate rate element (e.g., line item)*" to recover federal universal service contributions) (emphasis added).

[102] Cingular Comments at 46-49.

Cingular, Verizon Wireless and Sprint PCS are parties.[103] The comments submitted by other parties lend further support to Cingular's position.

There is broad consensus within the wireless industry and among various state filers and consumer groups supporting this definition of mandated charges. Verizon Wireless, Sprint, and Nextel support this definition.[104] And, as Nextel indicates, many wireless carriers already have incorporated this definition of mandatory charges into their billing systems.[105] This underscores Cingular's point in its Comments that the majority of wireless subscribers already are receiving bills that reflect this distinction between mandated and discretionary charges.[106] Changing this practice now for wireless carriers would cause confusion among this large group of consumers.

State governmental filers and their representative organizations also support this more narrow definition of mandated charges. NAAG, and NARUC, the Missouri PSC, and the Texas PUC support a definition of mandated charges that is limited to charges that carriers are required to collect from consumers.[107] As Cingular pointed out in its Comments, this definition is consistent with FCC precedent.[108] Support of this definition by NAAG, NARUC, the Missouri PSC, and the Texas PUC reflects that it also is consistent with state consumer protection laws.

Finally, NASUCA and the Consumer Groups[109] support this more narrow definition of mandated charges, noting its consistency with the AVCs and broad implementation already within the wireless industry.

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[103] *Id.*

[104] Nextel Comments at 8-9; Sprint Comments at ii; Verizon Wireless Comments at 39-40.

[105] Nextel Comments at 8-9.

[106] Cingular Comments at 51-52.

[107] NAAG Comments at 1; NARUC Comments at 3-4; Missouri PSC Comments at 6; Comments of the Texas Office of Public Utility Control ("Texas PUC") at 2-5.

[108] Cingular Comments at 47-48.

[109] NASUCA Comments at 3-12; Consumer Groups Comments at 7-8.

In sum, the more restrictive proposed definition of mandated charges is consistent with FCC precedent, has already been implemented by wireless carriers serving the majority of wireless subscribers, and is broadly supported by the wireless industry, state governmental filers and consumer advocates. In light of the foregoing, the more narrow definition of mandated charges should be adopted with respect to wireless telecommunications services.

VI. THE COMMISSION SHOULD REQUIRE THAT MANDATED CHARGES BE SEGREGATED FROM OTHER CHARGES ON WIRELESS BILLS

The Commission should adopt its proposal to require that mandated charges be segregated from other charges on bills for wireless services. As Cingular explained in its Comments, this requirement is consistent with the AVCs and already has been implemented by carriers serving the majority of wireless customers.[110] The requirement also fosters the underlying purpose of the truth-in-billing rules: to reduce consumer confusion. By distinguishing between charges that *must* be recovered from consumers and those that wireless carriers *choose* to pass along to consumers, this regulation will allow consumers to make meaningful decisions regarding competing wireless service offerings.

There is broad support for requiring mandated charges to be segregated in wireless bills. The wireless industry itself supports the proposal. Comments filed by Verizon Wireless, Sprint, Nextel and CTIA reflect that this practice already has been largely implemented, consistent with both the AVCs and the CTIA Consumer Code.[111] State governmental filers and consumer groups also agree. Comments filed by NAAG, NARUC, the Texas PUC, the Missouri PSC,

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[110] Cingular Comments at 51-52.

[111] CTIA Comments at 8; Nextel Comments at 10; Sprint Comments at 17; Verizon Wireless Comments at 39-40.

NASUCA, and the Consumer Groups[112] all support the segregation of mandated charges on customer bills. This support reflects that these commenters believe this requirement is consistent with state consumer protection laws and consumers' interests.

The Commission's proposal to require that mandated charges be segregated is consistent with the underlying goals of the truth-in-billing rules, is the predominant practice in the wireless sector, and is supported by state governmental and consumer group filers; as such, it should be adopted.

VII. THE COMMISSION SHOULD NOT ADOPT CATEGORIES OF CHARGES OTHER THAN "MANDATED"

The Commission should not adopt additional separate categories of charges beyond "mandated" charges. Cingular disagrees with commenters such as NAAG and NASUCA, who argue for additional sections in consumer invoices with charges under new categories labeled "carrier add-ons" or "carrier imposed charges."[113] First, there is no evidence that additional categories are necessary. The requirement to segregate mandated charges from all others provides notice to subscribers regarding the amount of charges a carrier has chosen to pass through to its subscribers, as opposed to what the government is requiring it to collect from subscribers. Indeed, the Consumer Groups Comments acknowledge precisely this point.[114]

Second, contrary to NAAG's and NASUCA's assertions, it is more likely that the introduction of additional categories to wireless consumer bills will increase consumer confusion. Additional categories will make customer bills more lengthy and more complex, and will require

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112 NAAG Comments at 1; NARUC Comments at 2; Texas PUC Comments at 2-5; NASUCA Comments at 3, 12-13; Consumer Groups Comments at 6, 9 (the Consumer Groups Comments acknowledge that this separation makes it clear to subscribers that such charges are not required by the government.)

113 NAAG Comments at 1, 9; NASUCA Comments at 2, 13-14.

114 Consumers Group Comments at 9.

additional descriptions and explanations to consumers at all points of interface, such as notices, invoices, and sales and marketing materials.

Third, NAAG and NASUCA fail to explain how their new proposed categories of charges differ from other discretionary carrier-imposed charges, such as charges for monthly service, so as to warrant a completely new section on customers' bills. Inexplicably, these commenters argue elsewhere that these regulatory cost recovery items should be *included* in monthly service charges because they are a cost of offering such service,[115] but then argue here that such charges are so distinct that they should be placed in a separate section of consumer bills. These inconsistent assertions cannot be used to form the basis of a new requirement to break-out charges into additional categories on customer bills where the need for such requirement has not been demonstrated.

VIII. THE ASSESSMENT OF CHARGES IDENTIFIED AS "REGULATORY ASSESSMENT FEES" AND "COST RECOVERY CHARGES" IS NOT *PER SE* MISLEADING, AND THE RECOVERY FOR MULTIPLE REGULATORY PROGRAMS IN SUCH LINE ITEMS IS NOT *PER SE* UNREASONABLE

Certain of the commenting parties urge the Commission to make a blanket determination that the use of line items entitled "regulatory assessment fees" or "cost recovery charges," or the use of terms such as "regulatory" or "government" or "cost recovery" or "portability" in a line item is *per se* misleading in violation of Section 64.2401(b) of the Commission's rules,[116] alleging that the mere use of these terms is "inherently misleading."[117] These commenters also assert that the combination of multiple regulatory programs into a single cost-recovery line item is un-

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115 NAAG Comments at 1.

116 NAAG Comments at 1, 4; Consumer Groups Comments at 11; NASUCA Comments at 20-22.

117 NASUCA Comments at 18-20.

reasonable in violation of Section 201(b) of the Communications Act.[118] Contrary to these assertions, it is the adoption of such a blunt approach to the resolution of these issues that would be unreasonable.

NAAG, NASUCA and the Consumer Groups urge the Commission to adopt an across-the-board conclusion regarding the legality of various line item charges without any consideration of the facts, descriptions or disclosures relating to such charges. However, as Cingular and other commenters demonstrated,[119] the Commission must evaluate line items pursuant to the policies it has established to evaluate whether charges and practices are misleading or unreasonable. The Commission must look not only to the line item itself, but also to any accompanying disclosures or descriptions. Pursuant to the Commission's *TIB Order* and guidance, a line item cannot be said to be misleading if the carrier accurately discloses the purpose of the line item, segregates it from mandated charges, and advises the customer that the charge is not a tax or otherwise required by the government. Absent an analysis of a particular line item in accordance with these principles, the Commission cannot, and should not, reach sweeping conclusions regarding the use of such line item.

Indeed, Cingular and other wireless carriers go to great lengths to provide disclosures to consumers regarding their charges, including in bills, notices, advertisements, websites, and through customer service representatives.[120] Pursuant to the AVCs, carriers serving the majority of wireless customers are required to disclose the rates applicable to the service being purchased,

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[118] NAAG Comments at 3; NASUCA Comments at 20-22; Consumer Groups Comments at 12.

[119] Cingular Comments at 57-59; CTIA Comments at 16; Nextel Comments at 17-18.

[120] While NAAG refers to carriers' disclosure practices in its Comments, it simply dismisses those practices without any discussion of factors that may differentiate certain disclosures from others, and without any evidence that certain disclosures are not adequate. *See* NAAG Comments at 3, 6.

including the amount, or range of varying amounts, of discretionary charges. The AVCs also require carriers to segregate mandated charges from discretionary charges on customer bills, and to disclose to subscribers that discretionary charges are not required by the government.[121] Cingular and other commenters have suggested that these same requirements be applied to all wireless carriers.[122] Line items that are employed consistent with these disclosure requirements cannot be said to be either misleading or unreasonable.

NAAG, NASUCA and the Consumer Groups also claim that such charges are inherently misleading,[123] but fail to provide any evidence supporting this claim. In fact, their assertions are at odds with the Commission's own view that such combined line items may be preferable to multiple single-purpose line items, because they are simpler and thus more easily understood by consumers.[124] While NASUCA acknowledges that the Commission recognized both potential dangers and potential benefits of line items that combine several charges,[125] NASUCA fails to explain why, without any record evidence, the Commission should reach the conclusion that the

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121 Cingular AVC at 14 ¶ 36.

122 Cingular Comments at 52-53; CTIA Comments at 8; Nextel Comments at 8-9; Sprint Comments at 17; Verizon Wireless Comments at 39-40.

123 NAAG Comments at 10; NASUCA Comments at 18-20.

124 *TIB Order*, 14 F.C.C.R. at 7511-12 ¶¶ 31-32. The Commission has expressly permitted the combination of charges in a single line item. For example, the Commission held that IXCs could combine service related charges with a dissimilar regulatory charge – USF – and ruled only that the carrier could not label the combined charge as solely USF or otherwise mislead consumers regarding the nature of the charge. *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review — Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-in-Billing and Billing Format*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 F.C.C.R. 24952, 24981 ¶ 58 (2002) ("*USF Contribution Order*").

125 NASUCA Comments at 21, n. 53.

harm outweighs the benefit and that such combination line items should be barred. Nor do the advocates of mandatory separation of such charges acknowledge that breaking these combinations apart into multiple line items, many of which may be only a few cents, may result in a lengthier, more complex bill that is more difficult for consumers to understand.

Third, an across-the-board prohibition on the use of line items that combine multiple programs impinges unduly on carriers' First Amendment rights. "[C]ommercial speech that is neither actually nor potentially misleading may be regulated" only if: (1) the government asserts "a substantial interest in support of its regulation;" (2) the government demonstrates that "the restriction on commercial speech directly and materially advances that interest;" and (3) the regulation is "'narrowly drawn.'"[126] Even assuming, *arguendo*, the government's interest is substantial, a flat ban on the use of combination line items – without consideration of the associated disclosures and descriptions – is not a narrowly drawn remedy. The Commission must not unduly restrict wireless carriers' flexibility to recover charges as they choose, absent some evidence that the method of recovery is misleading or unreasonable.

Moreover, a prohibition of combination line items would undercut the truth-in-billing rules. The forced use of single-purpose line items[127] would increase the length of consumer bills, making them more cumbersome, more difficult to understand, and more expensive for the carrier to generate – which increased costs ultimately would be borne by subscribers. Single-purpose

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[126] *TIB Order*, 14 F.C.C.R. at 7530 ¶ 60 & n.173, *quoting Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980).

[127] NASUCA assumes that the Commission's *Declaratory Ruling* effectively would require the use of single-purpose line items. NASUCA Comments at 19. This is not accurate. While the Commission ruled that states could not prohibit or require the use of line items, the Commission did not – and has not – ruled that carriers may not combine multiple cost recovery measures into a single line item.

line items also may not provide meaningful rate disclosures to consumers, since the apportionment of costs may result in line items of only a few cents.

IX. THE COMMISSION SHOULD ADOPT DISCLOSURE REQUIREMENTS FOR WIRELESS CARRIERS CONSISTENT WITH THE AVCS

To the extent the Commission determines that disclosure requirements are necessary with respect to wireless services, Cingular supports the adoption of requirements that are consistent with the AVCs. A few of the commenting parties have urged the Commission to adopt disclosure requirements that would add to or modify the requirements set out in the AVCs. Such additions to or modifications of the AVC requirements would not serve the public interest.

As explained above, the wireless carriers that are parties to the AVCs serve a majority of wireless subscribers. Changing the disclosure requirements after the AVCs already have been implemented with respect to this broad group of consumers likely would increase confusion, not to mention the cost of such changes. Further, it does not appear that requirements that are different from or in addition to those in the AVCs are warranted. The AVCs were negotiated by the Attorneys General of 33 states, who oversee the enforcement of various state consumer protection statutes. Those Attorneys General approved the AVCs, reflecting that they believed the disclosure requirements contained therein to be sufficient under their consumer protection laws. The commenting parties who urge the Commission to adopt more stringent disclosure requirements at this time have not demonstrated that additional measures are needed.

A. Disclosure of Mandatory and Discretionary Charges

The individual additions or changes to the AVC requirements that have been proposed would not serve the public interest. For example, the AVCs require carriers to disclose the fact that taxes, surcharges and other fees apply, and to provide a listing of the name and amount (or percentage formula) of such discretionary fees that do not vary by locality, and a range or the maximum amount of discretionary fees that vary by location. There is broad support for these requirements in the wireless industry.[128] Certain commenting parties, however, ask the Commission to require a precise statement of the amount of mandated and discretionary charges,[129] or an estimate that is no more than 10% less than the actual surcharge,[130] or to limit the amount of such charges.[131] Each of these suggestions, however, fails to recognize that the costs recovered by mandated and discretionary charges may require a change based on factors over which carriers have little or no control. Carriers have no control over, or ability to predict, the amount of government mandated charges. The costs recovered by carrier discretionary charges also can change unpredictably due to circumstances outside of carriers' control. Consider, for example, a gross receipts tax. Gross receipts taxes are not required to be collected from subscribers, and therefore would not be treated as a mandated charge under the definition supported by Cingular. If a gross receipts tax is enacted or increased after a customer signs up for service, such enactment or increase corresponds to an increase in carriers' costs. Carriers have no control over, and cannot predict, whether or when their costs will increase due to gross receipts taxes. The AVC recognizes this circumstance, and provides carriers with reasonable flexibility to provide a range of the potential discretionary charges that may appear on a customer's bill.

The proposals to limit discretionary charges to a fixed amount also appear to be inconsistent with Commission precedent regarding the recovery of costs associated with certain federal regulatory programs. The Commission has issued guidance with respect to certain of its regulatory programs, including local number portability and universal service, and stated that carriers

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128 Verizon Wireless Comments at 47; Sprint Comments at 22; CTIA Comments at 5.

129 Consumer Groups Comments at 29.

130 NAAG Comments at 12; NASUCA Comments at 54; Consumer Groups Comments at 30.

131 Nextel Comments at 19.

may recover their costs of compliance with these programs.[132] The Commission also has more generally stated that carriers may recover costs related to regulatory compliance.[133] The imposition of a cap on either mandatory or discretionary charges may preclude carriers from recovering costs underlying regulatory programs and compliance efforts. The Commission must take care not to undercut its precedent by limiting carriers' ability to recover such costs in the context of billing reform.

NAAG also would require carriers to advise customers of which government-mandated charges are in effect, that they are subject to change, and the range of such mandated charges.[134] The imposition of these requirements on carriers, however, conflicts with the nature of mandated charges. Specifically, the definition of mandated charges that both Cingular and NAAG support is one that includes only those charges which the government (in its sole discretion) imposes and requires carriers to collect from their subscribers. As such, carriers have no control over whether or what charges are imposed, the amount of those charges, or even the potential range of those charges. In light of this, it is not reasonable to impose such disclosure obligations on carriers with respect to mandated charges. The AVCs recognize this, and strike an appropriate balance that makes it clear to consumers which charges are required by the government and which charges are imposed by carrier choice – specifically, the AVCs require carriers to segregate mandated charges from all others, and not to represent or imply that discretionary charges are

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132 *See, USF Contribution Order*; *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, 14 F.C.C.R. 20850 (1999); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* Order on Reconsideration, 17 F.C.C.R. 14789 (2002).

133 *TIB Order*, 14 F.C.C.R. at 7509 ¶ 28.

134 NAAG Comments at 12.

taxes.[135] NAAG has not demonstrated that additional disclosure obligations should be imposed with respect to mandated charges.

B. Recordkeeping Obligations

Certain of the commenting parties seek to impose additional record keeping obligations on carriers that are not imposed by the AVCs. Specifically, NAAG and the Consumers' Groups urge the Commission to place the burden of proof on carriers regarding their compliance with the disclosure requirements. They also urge the Commission to require carriers to maintain documentation of their point of sale disclosures so that they may respond to regulators' inquiries.[136] Consumer Groups would further require the imposition of additional requirements applicable to in-person, internet and phone sales, including third-party verification of disclosures.[137] These commenters, however, have provided no evidence that the enforcement of compliance with the disclosure obligations should be handled any differently from other requirements.

Specifically, parties injured by a carrier's alleged non-compliance with a Commission rule may file a complaint with the Commission. Carriers are required to respond to such complaint, demonstrating whether or not the carrier complied with the requirement. To the extent there are documents that confirm a carrier's compliance with the requirement at issue, it is in the carrier's interest to provide such documents in its response. All other discovery obligations would be governed by Commission rules or the Federal Rules of Civil Procedure. The Commission should not impose new recordkeeping or verification requirements on carriers in this regard. The commenting parties have not demonstrated that the existing complaint process is insufficient for purposes of enforcing any disclosure obligations the Commission ultimately adopts.

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135 Cingular AVC at 14 ¶ 36.

136 NAAG Comments at 12; Consumer Groups Comments at 27.

137 Consumer Groups Comments at 27.

C. Cancellation Period

NASUCA urges the Commission to adopt a rule that would permit customers to cancel their service without penalty anytime within 45 days of the receipt of their first bill for service.[138] This proposal is ill-advised.

Cingular supports providing consumers with meaningful disclosures pursuant to the AVCs, and providing consumers a period of time during which they may try Cingular service and cancel that service without incurring an early termination fee ("ETF"). In fact, Cingular permits its customers to cancel their service without an ETF for 30 days after signing up for service. This is the longest ETF-free cancellation period of any nationwide wireless carrier.

The NASUCA proposal, however, confuses the purposes of the disclosure requirements with those underlying the implementation of cancellation periods. The purpose of disclosure requirements is to promote consumer understanding of billing statements, and to avoid confusion or surprise when customers receive their bills. If a carrier follows the disclosure requirements contained in the AVCs, which Cingular urges the Commission to adopt as rules, customers should not be surprised or confused by charges that appear on their first bill.[139] If there are errors on a customer's bill, the customer can contact the carrier (using the inquiry contact information included on the bill) to resolve the error.

In other words, adherence to the disclosure requirements makes it unnecessary to provide consumers with a trial period related solely to the format and content of their bills.[140]

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138 NASUCA Comments at 54.

139 The competitive CMRS marketplace has already forced disclosures beyond the AVCs; for example, a first bill estimator is contained in Cingular's Customer Service Summary.

140 Moreover, the 14-day trial period required by the AVCs reflects a reasonable balance between subscribers' desire for flexibility and carriers' need for certainty. Nothing in the record supports disturbing this balance, much less the unrealistically long cancellation period proposed by NASUCA.

D. Applicability to Changes in Service

Certain commenting parties propose requirements that are already largely or fully addressed by the AVCs, but with new twists that do not serve the public interest. For example, NASUCA argues that the disclosure requirements should apply not only when new customers sign up for service, but also when "existing customers amend their existing service, such as by extending service for a new term, adding a new service component to their existing calling plans, or adding additional lines, handsets or accounts to their current service plan."[141] The disclosure obligations of the AVCs already apply when new customers sign up for service, when existing customers renew or extend their contract term, and when customers change rate plans (regardless of whether such change results in a new contract term).[142] Thus, the existing disclosure requirements in the AVCs apply to new customers and to existing customers where they extend service for a new term; add a line, handset or account; or change their rate plan. The only change that NASUCA references that is not expressly addressed by the AVCs is the addition of a service component to a customer's plan. The absence of this requirement from the AVCs reflects the balance struck between carriers and the Attorneys General responsible for administering the consumer protection laws of their states. The costs associated with the AVCs' disclosure obligations far outweigh the benefits of such disclosures in the context of a minor change of a component of a service plan which does not rise to the level of either extending a customer's contract term or a change in their effective rate plan. NASUCA has not presented any evidence that the balance reflected in the AVCs should be re-struck at this time.

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141 NASUCA Comments at 53-54.

142 Cingular AVC at 5-8 ¶¶ 13, 18-22.

E. Applicability to Agents

In a similar vein, NASUCA and the Consumer Groups urge that the disclosure requirements should apply not only to carriers themselves, but also to all employees, subcontractors, agents and others engaged in the sale of services on behalf of carriers, and that carriers should be held ultimately responsible for their compliance.[143] Again, this issue is squarely addressed, and a balance was struck, in the AVCs. The AVCs impose disclosure obligations on carriers,[144] and also require carriers to (i) notify their agents of these requirements, including the disclosure requirements, (ii) ensure that advertisements provided to agents for the marketing and sale of the wireless service conform with the AVCs' terms, and (iii) not direct their agents to "take any action or implement any practice that is in contravention of" the AVCs.[145] The term "agent" is defined in the AVCs to include persons or entities who have a relationship with a carrier pursuant to which they sell the carrier's services, including any subcontractor, employee, servant, affiliate or agent of such party.[146] Thus, agents already are apprised of the AVCs' disclosure requirements and are provided advertising and marketing materials consistent with those requirements. Carriers are not permitted to make any requests of their agents that would undercut the AVCs' disclosure requirements. This is the balance that was struck by the Attorneys General and various carriers. If reflects an acknowledgement of the difficulty associated with holding carriers liable for third party actions – particularly in the context of existing agency agreements where such liability issues may not have been addressed, and the decision that such matters are most appropriately addressed in contract negotiations between private parties as opposed to government mandate. NASUCA has failed to demonstrate that additional measures are appropriate.

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143 NASUCA Comments at 53; Consumer Groups Comments at 26-27.

144 Cingular AVC at 5-8 ¶¶ 18-22.

145 Cingular AVC at 15 ¶ 39.

146 Cingular AVC at 5 ¶ 15.

CONCLUSION

For the foregoing reasons, Cingular respectfully requests that the Commission adopt the recommendations set forth herein.

Respectfully submitted,

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